Supreme Court, U.S.
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No. 01-1329

IN THE

Supreme Court of the United States

HENRY NICKELL,

Petitioner,

v.

MEMPHIS LIGHT, GAS & WATER DIVISION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Court of Appeals for the Sixth Circuit reversibly err in affirming the District Court's grant of summary judgment in favor of MLGW on the ground that Nickell did not establish a *prima facie* Title VII case.

2. Did the record contain sufficient direct evidence of discriminatory intent by the decision maker such that Nickell's case should have survived summary judgment notwithstanding the lack of a *prima facie* case based on circumstantial evidence?

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Henry B. Nickell, an individual citizen of the United States, residing in the Western District of Tennessee. Henry B. Nickell was the Plaintiff in the District Court, and the Appellant in the Sixth Circuit Court of Appeals.

Respondent

Memphis Light, Gas & Water Division, a division of the City of Memphis, Tennessee, is a municipal corporation. Memphis Light, Gas & Water Division was the Defendant in the District Court, and the Appellee before the Sixth Circuit Court of Appeals.

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Respondent respectfully requests that the Petition for a Writ of Certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case be denied.

STATEMENT OF THE CASE

As noted in the Petition, this is an action based upon Title VII in which Petitioner, Henry Nickell ("Nickell"), alleged that he was a victim of reverse discrimination because of his race (white).

Memphis Light, Gas & Water Division ("MLGW"), is a public utility as noted in the Petition. In his description of the various departments over which the Vice President of Operations (the position at issue in this case) presided, Petitioner omits the following descriptions of the departments managed by Nickell and the department managed by Alonzo Weaver ("Weaver") (the person Nickell contends was appointed to the Vice President of Operations position because of his race):

> Weaver's department, Electric Operations, included one hundred eighty one employees and had a payroll of over seven million dollars; of the six departments reporting to the Vice President of Operations, Electric Operations was the largest in both of these categories. In contrast, Nickell's department, Supply Planning and Engineering, ranked in both a distant fifth; he oversaw a total of ten employees and a payroll of barely five hundred thousand dollars.

See discussion in second from last grammatical paragraph of the Court of Appeals' July 30, 2001 decision affirming the trial court, at p. 50 of Appendix A to Petitioner's Petition.

In the fall of 1997, Petitioner, Henry Nickell, a white male employed by MLGW as Manager of Supply Planning and Utilization Engineering, along with six other MLGW employees (five white and one black) sought promotion to the Vice-President - Operations position in question. Of those applicants, three possessed MBA degrees, as did Sanford Novick, the person last employed by MLGW as Vice President Operations, on a "non-acting" basis. These three applicants, all of whom possessed MBA degrees, were referred for interview for the position; the notice for the position recited that an "MBA or other advanced degree was preferred." Nickell did not have an MBA degree but did have a Master's Degree in Physics. Of the three persons referred for interview, Weaver, a black male, who prior to assuming duties as Acting Vice-President of Operations managed MLGW's Electric Operations Department which, as noted above, had the largest number of employees and largest payroll. Weaver was selected to fill the Vice President Operations position.

Petitioner grossly misrepresents in the third grammatical paragraph of Petitioner's Statement of the Case the alleged "formal policy that guaranteed that Nickell and Garland and certain other employees, would not be excluded from consideration for bid positions solely due to requirement of an engineering degree." Nothing in such directive is relevant or otherwise pertinent to the decision-making process for selection of a Vice President of Operations. Nickell's lack of an engineering degree was not asserted by anyone as a reason Nickell was excluded from consideration for the Vice president Operations position. He was considered for the position, but was not selected for interview.

Additionally, Petitioner grossly misrepresents the circumstances and context of the vaguely described statements by Delois Campbell ("Campbell"), who, according to Petitioner, ". . . admitted that she took race into consideration in the selection process, although she admitted this was not legal" and by Curtis Dillihunt, Vice President of Human Resources of MLGW, who according to Petitioner, allegedly admitted at his deposition that at MLGW "the race of a person is considered in determining whether a candidate should be considered for a position but that it should not be so." Excerpts of Campbell's June 15, 1999 deposition and Dillihunt's June 22, 1999 deposition showing the deposition testimony in question are attached hereto as Appendix A and Appendix B respectively. Nothing in such deposition testimony is an admission or other "direct evidence" of discriminatory intent in the employment decision at issue in this case.

Ms. Campbell specifically denied that race was a consideration in the process by which Weaver was selected as one of the persons to be interviewed by the decision maker, MLGW President Herman Morris ("Morris").

Regarding Dillihunt, there is no evidence that Dillihunt was involved in any way in the selection process by which Weaver was selected as Vice President of Operations.

Furthermore, there is no evidence of any statements by Campbell, Dillihunt, Morris or anyone involved in the selection process contemporaneous with the time the selection decision was being made by Mr. Morris

Finally, Petitioner fails to point out in the Petition that during his meeting with Morris, briefly mentioned in the middle of page 4 of Petitioner's printed Brief, Petitioner asked

for an interview and that Mr. Morris declined to interview Petitioner. Such direct contact between Petitioner and Mr. Morris in connection with Mr. Morris' decision to not interview Petitioner, further marginalizes Ms. Campbell's role in the decision to not interview Petitioner.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals and District Court Did Not Err in Using the *McDonnell Douglas/Burdine Burden Shifting Analysis* in Deciding This Case.

In his Petition, Petitioner argues that the Court of Appeals erred by using the *McDonnell Douglas/Burdine Analysis* because there is direct evidence of discrimination.

In the appeal below, Plaintiff initially accepted the proposition that a *prima facie* case of reverse discrimination is established upon a showing that "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority [and] that the employer treated differently employees who were similarly situated but not members of the protected group." *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 801 (6th Cir. 1994).

Rather than challenge the use of such analysis in this case, Petitioner initially argued that the District Court erred by not analyzing the "background circumstances" prong of the reverse discrimination burden shifting analysis, that Petitioner and Weaver were "similarly situated" and that issues of material fact were present as to whether Petitioner and Weaver were similarly situated.[1]

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1. A copy of Petitioner's statement of issues, as contained in the Final Brief of Appellant filed by Petitioner in the Court of Appeals (Cont'd)

Petitioner did not raise the issue as to the applicability of the McDonnell Douglas analytical structure until filing its Petition for Reconsideration And En Banc Review. That Petition was denied in an order stating, *inter alia*, "the issues raised in the Petition were fully considered upon the original submission and decision of the case."

As discussed in the following section, the record did not contain direct evidence of discrimination. Accordingly, application of the McDonnell Douglas burden shifting analysis was appropriate.

II. The Record Does Not Contain Direct Evidence of Discriminatory Intent Sufficient to Avoid Application of the *McDonnell Douglas/Burdine Analysis*.

The alleged "direct evidence" on which Petitioner relies does not meet any definition of "direct evidence" as customarily used by the circuits. Evidence is direct evidence, excusing Plaintiff from having to use the inferential model set forth in McDonnell Douglas, only if it both speaks to the issue of discriminatory intent and relates to the specific employment decision in question. *Baron v. City of Highland Park*, 195 F.3d 333, 339 (7th Cir. 1999). *See also Vakharia v. Swedish Covenant Hospital*, 190 F.3d 799, 806 (7th Cir. 1999), *cert denied*, 530 U.S. 1204, 120 S. Ct. 2197 (2000), affirming a grant of summary judgment to defendants and stating, "Direct evidence of discrimination is evidence which

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(Cont'd)
is attached hereto as Appendix C. Regarding the contention of error in finding there were no outstanding issues of material fact, at page 22 of the Final Brief of Appellant, Petitioner declared "At the very least there are genuine issues regarding how similarly situated Nickell and Weaver were."

if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption." *See also Schoenfield v. Babbitt*, 168 F.3d 1257, 1266-67 (11th Cir. 1998) defining direct evidence as evidence not requiring the drawing of an inference or presumption. *See also Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998), rehearing *en banc denied*, 172 F.3d 884 (11th Cir. 1999), ("Direct evidence is evidence that establishes the existence of discriminatory intent behind the employment decision without any inference or presumption.")

No such "direct evidence" is present in this case.

The ultimate decision maker was Morris. There is no "direct evidence" of consideration of race by Morris in making his decision. Any conclusions as to discriminatory intent by Morris would necessarily require use of the inferential model. In this case, Petitioner is asking that inferences be made regarding Morris' intent on the basis of ambiguous statements by persons other than Morris. An "isolated and ambiguous comment . . . does not establish direct evidence of discrimination." *Hopkins v. Electronic Data Sys. Corp.*, 196 F.3d 655, 65[illegible] (6th Cir. 1999) This case does not, therefore, contain sufficient direct evidence to provide a basis for clarification of any rule of law — particularly when, as discussed below, clarification is not necessary.

III. The Question Presented is Unimportant Because This Court Has Already Clearly Held That the *McDonnell Douglas/Burdine Burden Shifting Analysis* is Inapplicable to An Employment Discrimination Case if Direct Evidence of Discrimination is Present.

In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 83 L. Ed. 2d 523, 105 S. Ct. 513 (1985) this Court stated:

> . . . [T]he McDonnell Douglas test is inapplicable where plaintiff presents direct evidence of discrimination.

Such was recognized by the Sixth Circuit as controlling precedent in *Burns v. City of Columbus, Department of Public Safety*, 91 F.3d 836, 843 (6th Cir. 1996). ("What is perhaps most important to note is that the Supreme Court developed the McDonnell Douglas/Burdine burden-shifting analysis for Title VII cases as an available method of proof on the element of the grantee's subjective intent where no direct evidence of discriminatory intent exists.") Such was also recognized by other circuits. *See, e.g., Fields v. Clark University*, 817 F.2d 931, 934 (1st Cir. 1987), appeal after remand 966 F.2d 49 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052 (1993); *Montana v. First Federal Savings and Loan Association of Rochester*, 869 F.2d 100, 104 (2d Cir. 1989); *Iadimarco v. Runyon*, 190 F.3d 151, 162 (3d Cir. 1999); *Spagnuolo v. Whirlpool Corporation*, 641 F.2d 1109, 1113 (4th Cir. 1981), *cert. denied*, 454 U.S. 860 (1981); *Rizzo v. Children's World Learning Center, Inc.*, 84 F.3d 758, 762 (5th Cir. 1996), appeal after remand 173 F.3d 254 (5th Cir. 1999), decision on rehearing *en banc* of appeal after remand 213 F.3d 209 (2000), *cert. denied*, 531 U.S. 958 (2000); *Coco v. Elmwood Care, Inc.*, 128 F.3d 1177, 1180 (7th Cir. 1997); *Perry v. Kunz*, 878 F.2d 1056, 1059 (8th Cir. 1989); *Douglas v. Anderson*, 656 F.2d 528 n.2 (9th Cir. 1981); *Notari v. Denver Water Department*, 971 F.2d 585, 590 (10th Cir. 1992); *Dybczak v. Tuskegee Institute*, 737 F.2d 1524, 1528 (11th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985); *Cones v. Shalala*, 199 F.3d 512, 516 (D.C. Cir. 2000).

Accordingly, nothing would be added to jurisprudence regarding the applicability or non-applicability of a McDonell Douglas/Burdine analysis in an employment discrimination case by granting a writ of certiorari in this case.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPT FROM JUNE 15, 1999 DEPOSITION OF DELOIS CAMPBELL

[Commencing at page 49]

* * *

Q. Have you ever heard anyone at MLG&W state that they were instructed to fill a position on the basis of race?

A. No. Now, some years ago when MLG&W was under a consent decree.

Q. Under affirmative action?

A. Right. Then we did. Now, in the most recent years, what management has been told was, you know, to try to have parity as much as possible. But a person would have to meet the qualifications or specifications of the job.

Q. What does parity mean; what do you mean by that?

A. Meaning that we would like our work force to represent the SMSA for our area, but, [50] in some cases, that is just not possible. Like, for example, for years we tried to get women to work in the field. We have women to work in the field, but, sometimes, it is just difficult to find some people for some jobs.

* * *

[93] * * *

Q. You had a discussion with Ms. Caldwell during her examination of you in which you referred to a desire for parity. Do you recall that discussion or using that phrase?

[94] A. Well, yes.

Q. To the best of your knowledge, did a desire for parity in any way influence your decision in selecting the people that you selected for interviewing for the position of vice president of operations?

A. No. In reaching parity, you know, if it is possible to do so, we were not under consent order or an affirmative action command or anything like that.

Now, you know, I look to see if there is a way to do so. You know, but I don't make any special — I would not reject one person for another just to see, well, I am trying to get a woman or something of that nature.

Q. So, was that desire —

A. So, it would have to be solely on qualifications. Now, it is something that management has to keep in mind. Maybe I can explain it better this way.

If I have, say, candidates and all of their qualifications are relatively equal, and let's say I have the position that is [95] nothing but men and I have an opportunity, say, to hire or promote a woman, then I would want to give her consideration, but she would have to meet the job specifications.

Q. Who told you that —

A. That is a management given.

Appendix A

Q. That is a management given, well —

A. Yes. In our, what is it, the goals that we had each year, you know, that wherever possible, but not that we were to ever, say, exclude a person or a group just to try to, say, reach a number.

Q. Did those goals in any way influence or operate as a factor in the selection of the vice president of operations?

A. No. Mr. Morris just wanted top candidates.

* * * *

APPENDIX B — EXCERPT FROM JUNE 22, 1999 DEPOSITION OF CURTIS DILLIHUNT

[Commencing at page 36]

* * *

Q. Would you agree that in the absence of a decree or order of the court, that it is illegal and inadmissible to consider the sex or race of an individual for an appointment?

A. I would think that the attorneys would have a more better expert than I am in that area. But the question that you asked, do you consider the sex or a race of a person in trying to determine should they be a subject for the position?

[37] Q. Yes, sir.

A. From a layman's standpoint, I would say yes, I agree with that.

Q. You agree that they should be considered?

A. No, should not.

* * * *

APPENDIX C — EXCERPT FROM BRIEF FOR APPELLANT

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